No. 02-1192

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IN THE

Supreme Court of the United States

COOPER INDUSTRIES, INC.,

Petitioner,

v.

AVIALL SERVICES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE STATES OF NEW YORK, ARIZONA, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, ILLINOIS, LOUISIANA, MASSACHUSETTS, MICHIGAN, MISSOURI, MONTANA, NEVADA, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, TENNESSEE, WASHINGTON, WISCONSIN, AND WYOMING, AND THE COMMONWEALTH OF PUERTO RICO, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

The *amici curiae* States, through their Attorneys General, respectfully request that the Court reject the argument, advanced by Petitioner Cooper Industries, Inc. and the United States as *amicus curiae*, that the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, does not provide a right to contribution except where CERCLA also specifies a limitations period for a contribution claim. There is no question that CERCLA § 113(f)(3)(B) [42 U.S.C. § 9613(f)(3)(B)] – a provision whose construction is not directly implicated by the present case – expressly provides for a right of contribution after a potentially responsible party ("PRP") resolves its liability with a State (or the United States) by way of an administrative settlement. Yet, neither CERCLA § 113(g)(3) [42 U.S.C. § 9613(g)(3)], nor any other provision of the statute, establishes a period of limitations for bringing such a contribution claim. Given the importance of the right to contribution as an incentive to settle with a State, the *amici* States oppose assigning unwarranted significance to Congress' failure to identify a specific period of limitations, particularly where Congress explicitly grants a right to contribution elsewhere in the statute.

CERCLA, as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613 (1986), provides a comprehensive mechanism for cleaning up hazardous waste sites, and for imposing the costs of cleanup on those responsible for the contamination. *See, e.g., United States v. Bestfoods*, 524 U.S. 51, 55-56 (1998). To this end, the States, in conjunction with the federal government, play a critical role. For example, States participate in the planning, selection, and

implementation of remedial actions. CERCLA § 121(f), 42 U.S.C. § 9621(f); 40 C.F.R. §§ 300.500-300.525 (2003). The President, acting through the United States Environmental Protection Agency, may take no remedial action under CERCLA unless the State in which a release occurs enters into a contract or cooperative agreement with the federal government. CERCLA § 104(c)(2)-(3), 42 U.S.C. §§ 9604(c)(2)-(3). Moreover, if a State cleans up a site, it may sue any PRP to recover response costs "not inconsistent with the national contingency plan," the same statutory standard applicable to cost-recovery actions brought by the United States. CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A).

Of particular significance here, CERCLA provides a considerable incentive for PRPs to enter into administrative or judicially approved settlements with the States (or the United States). A party that resolves its liability by way of such settlement benefits from the ability to seek contribution from other PRPs under § 113(f)(3)(B). In addition, the settling party "shall not be liable for claims [by nonsettling PRPs] for contribution regarding matters addressed in the settlement." CERCLA § 113(f)(2), 42 U.S.C. § 9613(f)(2). Thus, "potentially responsible parties who choose to settle gain protection from contribution, enjoy potentially favorable settlement terms, and retain the ability to seek contribution from other defendants." *Bedford Affiliates v. Sills*, 156 F.3d 416, 427 (2d Cir. 1998); *see also United Techs. Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 103 (3d Cir. 1994), *cert. denied*, 513 U.S. 1183 (1995) (noting that CERCLA is "designed to encourage settlements and provide PRPs a measure of finality in return for their willingness to settle") (internal quotations omitted). As a practical matter, these incentives are critical to the smooth functioning of the

administrative process and the cleanup of many sites without the burdens and expenses of litigation. The *amici* States, therefore, have a strong interest in opposing the "limitations period" argument advanced by Petitioner and the United States to the extent that it may enable others in the future to undercut the express right of a PRP who settles administratively with a State to seek contribution under § 113(f)(3)(B) from other PRPs.

SUMMARY OF ARGUMENT

Contrary to the suggestions of both Petitioner and the United States, the fact that CERCLA § 113(g)(3) expressly provides a period of limitations for bringing a contribution claim in certain circumstances should not be interpreted to mean that in any instance where CERCLA fails to establish a period of limitations, a right to contribution does not exist. As with § 113(f)(3)(B), which expressly authorizes a PRP that resolves its liability with a State (or the United States) by way of an administrative settlement to bring a contribution action against nonsettling PRPs, Congress often has enacted statutes that create causes of action without providing corresponding periods of limitations. The *amici* States thus urge the Court to assign no significance to CERCLA's failure to identify a specific period of limitations, particularly where Congress has explicitly granted a right to contribution elsewhere in the statute.

ARGUMENT

I. THE ABSENCE OF A LIMITATIONS PERIOD IN CERCLA § 113(g)(3) FOR A CONTRIBUTION ACTION THAT FOLLOWS A VOLUNTARY CLEANUP OF A CONTAMINATED SITE DOES NOT DIMINISH ANY RIGHT TO CONTRIBUTION PROVIDED BY CERCLA.

The central issue before the Court is whether CERCLA § 113(f)(1) [42 U.S.C. § 9613(f)(1)] authorizes a PRP to seek contribution under CERCLA from another party where, as here, it is undisputed that the PRP has not: (1) been sued civilly by the federal government under CERCLA § 106 [42 U.S.C. § 9606] to abate the actual or threatened release of a hazardous substance from a facility, or by either the federal government or a State under CERCLA § 107(a) [42 U.S.C. § 9607(a)] to recover response costs; or (2) otherwise resolved its liability to the federal government or a State through an administrative or judicially-approved settlement. Petitioner and the United States assert that in this circumstance, a PRP may not seek contribution under CERCLA. In an effort to bolster that statutory interpretation, they argue that the absence of any limitations period in CERCLA § 113(g)(3) to govern Respondent Aviall Services, Inc.'s contribution claim "provides further evidence that Congress did not intend to create a federal right to contribution in [the present] situation." U.S. Br. 21-22; *see also* Pet. Br. 31-33.

The fact that CERCLA expressly provides for a period of limitations in one instance, however, does not mean that only those contribution actions for which CERCLA provides an express period of limitations may be brought pursuant to

the statute. Section 113(g)(3) imposes a three-year period of limitations for contribution actions brought: (1) during or following a § 106 or § 107(a) action; (2) after a *federal* administrative settlement pursuant to CERCLA §§ 122(g)-(h) [42 U.S.C. §§ 9622(g)-(h)]; and (3) after any judicially approved settlement. Neither § 113(g)(3), nor any other provision of CERCLA, establishes a limitations period for contribution actions brought after a *State* administrative settlement. Nonetheless, § 113(f)(3)(B) expressly provides that a PRP who enters into a settlement with a State may bring a contribution action against other PRPs: "A person who has resolved its liability to . . . a State for some or all of a response action or for some or all of the costs of such action . . . in an administrative . . . settlement may seek contribution from any person who is not party to [the] settlement[.]" Particularly in view of this clear statutory language, which provides a significant incentive for PRPs to settle their liability with State environmental authorities, *see Bedford Affiliates*, 156 F.3d at 427; *United Techs. Corp.*, 33 F.3d at 103, the Court should refrain from adopting any argument that may undermine the contribution right provided by § 113(f)(3)(B).

There is no question that this case involves a dispute over the interpretation of § 113(f)(1), not § 113(f)(3)(B). In § 113(f)(1), the first and last sentences – the "enabling" and "savings" provisions – read as follows:

> Any person may seek contribution from any other person who is liable or potentially liable under section 107(a) [42 U.S.C. § 9607(a)], during or following any civil action under section 106 [42 U.S.C. § 9606] or under section 107(a) [42 U.S.C. § 9607(a)]. . . . Nothing in this

> subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 106 or 107 [42 U.S.C. §§ 9606 or 9607].

The Fifth Circuit's *en banc* majority reads the savings provision literally in holding that "'nothing' in the section shall 'diminish' any person's right to bring a contribution action in the absence of a section 106 or section 107(a) action." *Aviall Servs., Inc. v. Cooper Indus., Inc.*, 312 F.3d 677, 681 (5th Cir. 2002).

To support their contrary interpretation of § 113(f)(1)'s savings provision, Petitioner and the United States rely in part on § 113(g)(3), which establishes limitations periods for contribution actions in a variety of circumstances. That section reads as follows:

> Contribution. No action for contribution for any response costs or damages may be commenced more than 3 years after –
>
> > (A) the date of judgment in any action under this Act for recovery of such costs or damages, or
> >
> > (B) the date of an administrative order under section 122(g) [42 U.S.C. § 9622(g)] (relating to de minimis settlements) or 122(h) [42 U.S.C. § 9622(h)] (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

Petitioner and the United States assert that because § 113(g)(3) provides no statute of limitations in the absence

of either an action under §§ 106 or 107(a), an administrative settlement with the federal government under § 122(g)-(h), or a judicial settlement with the federal government or a State, Congress could not have intended to *imply* a right to contribution under § 113(f)(1) for parties who voluntarily cleanup a contaminated site in the absence of a triggering event under § 113(g)(3). Pet. Br. 31-33; U.S. Br. 21-22. If accepted without qualification, this argument could have serious ramifications for State environmental enforcement authorities throughout the Nation.

Where CERCLA grants a right to contribution, the presence or absence of a limitations period in § 113(g)(3) establishes nothing more than a Congressional omission, intentional or otherwise. Indeed, although the statute fails to provide a period of limitations in § 113(g)(3) for contribution actions brought by a PRP who resolves its liability to the State by way of an administrative settlement, § 113(f)(3)(B) expressly establishes a right to such contribution. Unless one is prepared to ignore the express language of that statute, the absence of a limitations period alone cannot preclude a PRP who settles administratively with a State from bringing a contribution action pursuant to CERCLA.[1]

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1. Numerous federal courts have held that a PRP also may seek contribution where the federal government has issued an administrative order pursuant to CERCLA § 106(a), but has not yet brought a civil action under § 106 to enforce that order. *See, e.g., Sun Co. v. Browning-Ferris, Inc.*, 124 F.3d 1187 (10th Cir. 1997), *cert. denied*, 522 U.S. 1113 (1998); *General Elec. Co. v. American Ann. Group, Inc.*, 137 F. Supp. 2d 1 (D.N.H. 2001); *Barmet Alum. Corp. v. Doug Brantley & Sons, Inc.*, 914 F. Supp. 159 (W.D. Ky. 1995); *Gould Inc. v. A&M Battery & Tire Serv.*, 901 F. Supp. 906 (M.D. Pa. 1995). Although the United States takes a diametrically opposite position in a footnote in its brief (U.S. Br. 22 n.11), that issue is not presently before the Court and need not be addressed.

To be sure, when CERCLA was enacted in 1980 and amended in 1986, it was far from unusual for Congress to create a cause of action but fail to provide a pertinent period of limitations, thereby leaving it to the courts to "borrow" an appropriate applicable period from other sources of law. *See North Star Steel Co. v. Thomas*, 515 U.S. 29, 33 (1995) (noting that "[a] look at this Court's docket in recent years" demonstrates the frequency of that circumstance); *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 355 (1991) ("Congress ordinarily intends" for such borrowing "by its silence"); *Reed v. United Trans. Union*, 488 U.S. 319, 323 (1989) ("Congress not infrequently fails to supply an express statute of limitations when it creates a federal cause of action."). Although Congress has since eliminated the need to borrow periods of limitation from other sources of law for statutes passed after December 1, 1990,[2] CERCLA was enacted and amended prior to that date.

The fact that Congress frequently omits express periods of limitation, therefore, weighs against any attempt by Petitioner and the United States to vest § 113(g)(3)'s silence with undue significance.[3] The Court thus should refrain from

2. December 1, 1990 is the effective date of 28 U.S.C. § 1658(a), "which supplies a general, 4-year limitations period for any federal statute subsequently enacted without one of its own." *North Star*, 515 U.S. at 34 n.*.

3. In fact, the lower federal courts routinely have found that a PRP who settles its liability administratively with a State may bring a contribution action pursuant to CERCLA § 113(f)(3)(B) in the absence of any limitations period, but the courts have differed as to which period of limitations applies in that circumstance. *See, e.g., Union Station Assocs. LLC v. Puget Sound Energy, Inc.*, 238 F. Supp. (Cont'd)

adopting without limitation any argument that may have the unintended effect of undermining the States' significant interest in preserving the incentive provided by § 113(f)(3)(B) for PRPs to enter into administrative settlements with State environmental authorities. *See Bedford Affiliates*, 156 F.3d at 427; *United Techs.*, 33 F.3d at 103.

(Cont'd)
2d 1226 (W.D. Wash. 2002) (finding right of contribution and applying three-year period of limitations from § 113(g)(3)(B)); *Sherwin-Williams Co. v. ARTRA Group, Inc.*, 125 F. Supp. 2d 739 (D. Md. 2001) (applying statutes of limitation provided by § 113(g)(2)); *W.R. Grace & Co. v. Zotos Int'l, Inc.*, No. 98-CV-838S(F), 2000 U.S. Dist. LEXIS 18091 (W.D.N.Y. Nov. 2, 2000) (applying no statute of limitations where none of the "triggering events" of § 113(g)(3) were present); *Reichhold Chems., Inc. v. Textron, Inc.*, 888 F. Supp. 1116 (N.D. Fla. 1995) (same). In other instances, too, federal courts have held that a right to contribution lies even where CERCLA provides no express period of limitations to govern the action. *See, e.g., City of Wichita v. Aero Holdings, Inc.*, 177 F. Supp. 2d 1153 (D. Kan. 2000); *Advanced Micro Devices, Inc. v. National Semiconductor Corp.*, 38 F. Supp. 2d 802 (N.D. Cal. 1999); *Kaufman & Broad-South Bay v. Unisys Corp.*, 868 F. Supp. 1212 (N.D. Cal. 1994).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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